2-6-1976

Eugene V. Gosser D-B-A, Gene Gosser Realty v. Joseph J. Bertram

Appellee's Brief 1975-SC-1064

APPELLEE'S BRIEF

SUPREME COURT OF KENTUCKY

File No. 75-1064

EUGENE V. GOSSER D-B-A
GENE GOSSER REALTY — APPELLANT

VS:

JOSEPH J. BERTRAM — APPELLEE

APPEAL FROM PULASKI CIRCUIT COURT
HON. LAWRENCE S. HAIL, JUDGE

BRIEF FOR APPELLEE

I certify that a copy of this brief has been served on Appellant and the Trial Judge as required by RCA 1.250.

This February 5, 1976.

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INDEX, POINTS AND AUTHORITIES

Page

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Was the Real Estate Sale and Purchase Contract prepared by Appellant and signed by Appellee and the Prospective Buyer, Lawrence T. Krech, a legal and binding contract on which Appellee could maintain an Action for Compliance or for Damages by reason of the breach? Or was Appellee limited to a Recovery of only $5,000.00 as damages?

II. Is Appellant entitled to a 5% Commission of the purported Listing Price of the Property?

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MAY IT PLEASE THE COURT:

COUNTERSTATEMENT OF THE CASE

Appellee filed this action in the Pulaski Circuit Court on May 4, 1971, against the Appellant, Eugene V. Gosser d-b-a-Gene Gosser Realty to recover the sum of $5,000.00 which Appellant had received from one, Lawrence T. Krech, the purposed purchaser of Appellee's property by the terms of a "Real Estate Sale and Purchase Contract." (T of R pp 6-7).

Appellant filed his motion to dismiss the complaint on the

chief ground, that appellee had failed to join an indispensable party, Lawrence Krech. (T of R pp. 9, 10 and 11).

The Trial Court by order dated June 18, 1971, held that Lawrence T. Krech was a necessary party and allowed Appellee twenty days in which to amend his complaint. (T of R pp 12-13).

On July 8, 1971, Appellee filed his amended complaint making Lawrence T. Krech a party defendant. (T of R pp 14, 15 and 16).

Appellant filed his answer and counterclaim admitting that he had in his possession the $5,000.00 in question, alleging that he was unable to determine who to pay the money to. (T of R pp 17-18).

Appellant further alleged in his counterclaim that Appellee was indebted to Appellant in the sum of $6,500.00 under the terms of a "Real Estate and Purchase Contract," filed as exhibit "A" to Appellee's complaint, and that he be permitted to set off the $5,000.00 which he held against his claim. (T of R pp 19, 20 and 21).

Defendant, Lawrence T. Krech, filed his answer and cross claim on October 26, 1971, in which he alleged that the $5,000.00 paid by him to Appellant was his money and should be refunded to him under the terms of the contract above referred to as exhibit "A." (T of R pp 37 to 41).

Without referring to other motions, orders and pleadings, which are not essential on this appeal, the Trial Court by order duly entered set this action for hearing on friday, October 13, 1972, before the Court. (T of R p. 49).

This Action was heard by the Court and after deliberation the Court did, on February 10, 1975, file an "Opinion of the Court." (T of R pp 56 to 67).

On August 19, 1975, the Court entered its Findings of Fact, Conclusions of Law and Judgment, by the terms of which the defendant, Lawrence T. Krech, was adjudged to have no right, title or interest in the $5,000.00 held by Appellant, and that Appellee recover of the Appellant the sum of $5,000.00, subject to a credit of $250.00 to be retained by Appellant, and that Appelee recover of Appellant and the defendant, Lawrence T. Krech, jointly and severally his cost. (T of R pp 68, 69 and 70).

From this judgment the defendant, Lawrence T. Krech did not prosecute an appeal to this Court, and Appellant filed an appeal. T of R pp 71-72).

ARGUMENT

I. WAS THE REAL ESTATE SALE AND PURCHASE CONTRACT PREPARED BY APPELLANT AND SIGNED BY APPELLEE AND THE PROSPECTIVE BUYER, LAWRENCE T. KRECH , A LEGAL AND BINDING CONTRACT ON WHICH APPELLEE COULD MAINTAIN AN ACTION AGAINST KRECH FOR COMPLIANCE OR FOR DAMAGES BY REASON OF THE BREACH? OR WAS APPELLEE LIMITED TO A RECOVERY OF ONLY $5,000.00 AS DAMAGES?

Appelle, Joseph J. Bertram, did on March 10, 1970, enter into a Listing Contract with Appellant to sell for him certain real estate and personal property located on North U.S. Highway No. 27 in Pulaski County, Kentucky. This contract provided that Appellee would pay Appellant a 5% commission on the gross consideration accepted by me --- (T of R p 23).

On September 29, 1970, Appellant presented to Appellee a "Real Estate Sale and Purchase Contact" which contract had been signed by the defendant, Lawrence T. Krech, on September 27, 1970. Appellee signed the "acceptance" section of the contract. (T of R p. 7).

Krech at or about this time deposited with Appellant his check in the sum of $5,000.00, which money was to be used by Appellant as provided in item 6 of the Real Estate Sale and Purchase Agreement. (T of R pp. 6, 7 and 8) Defendant, Krech failed to complete the purchase of Appellee's property for the stipulated purchase price and defaulted under the

proposed contract.

The evidence in this action discloses that all Listings and Contracts involved in this action were prepared by or under the direction of Appellant without assistance or legal advice of an Attorney. Appellee relied upon and accepted Appellant's preparation of all papers. (T of R pp 5, 6, 32, 33, 65, 66 and 68).

Appellee contends that any inconsistencies in any of the papers prepared by Appellants construed against Appellant.

This Court held in the case of :

Bays, Et Al (v) Mahan, Et Al; 1962, Ky. 362 S.W. (2) 732:

> "Two common and fundamental rules of construction of contracts are that words shall be accorded their ordinarily used meaning unless the context requires otherwise and a contract shall be construed more strongly against the party who prepared it."

Appellant's proposed "Real Estate Sale and Purchase Contract" was nothing more than an Option to purchase executed by Appellee and defendant, Krech, there was no binding contract between the parties.

Paragraph (2) of the proposed contract provided:

> "In the event that financing cannot be secured as hereinabove provided, and this transaction is not concluded on or before November 30, 1970, then this agreement is to be null and void."

Defendant, Krech could not get the necessary financing and this transaction was not concluded on or before November 30,

1970, therefore, the proposed "Real Estate Sale and Purchase Contract" was void pursuant to its terms, and Appellee could not legally or otherwise take action against the defendant, Krech, except to collect the $5,000.00 as liquidated damages. (T of E pp 32, 33, 37, 38, 40, 75 and 79).

Paragraph (5A) of the contract further provided:

"If Buyer's sale of all outstanding shares of Sala, Inc., an Illinois corporation, is not concluded on or before October 1, 1970, then this agreement is to be null and void, and earnest money refunded."

Appellant having prepared all Listings and Contracts in this transaction, the burden was on Appellant to have an enforceable contract between the Seller and Buyer, by the terms of which the Seller, Appellee, would have a right of legal action against the buyer, should the buyer fail to comply with the terms of the contract, and the buyer furnished by Appellant, must be, at all times, ready, able and willing to purchase the property on the prescribed terms.

This Court has held:

Hill (v) Coy: 1954 Ky. 266 S.W. (2) 312:

"A real estate broker becomes entitled to his fee only when he produces a person ready, willing and able to buy the property listed with him for sale."

"Prospective buyers unable to procure requisite financing were not ready, willing and able to buy and broker did not earn his commission merely by finding such prospective buyers."

Further this Court held:

Casey (v) Hart Wallace & Co. : 188 Ky. 441 : 222 S.W. III.

"A real estate broker may earn his commission, either by producing a person who is not only then, but at all times, ready, able and willing to purchase the property on the prescribed terms, or by obtaining from the customer a binding contract which the landowner himself may enforce, in case of a breach or default in its terms."

This Court held in the case of:

Brown, Et Al (v) Warden's Adm'r., Et Al; 1935, 261 Ky. 846, 88 S.W. (2) 958:

"Realty broker, seeking to recover commission from owner's estate, had burden to establish by competent, relevant evidence substantial performance of contract for sale of realty."

"Owner's mere contracting or listing with another property for sale does not entitle such other to commission, but contract must be substantially performed to entitle him to commission."

The evidence in this action is clear, the broker, Appellant, at no time had a buyer who was ready, willing and able to buy at all times.(T of E pp 32, 33, 40, 41, 42, 46, 49 and 54).,

Appellee was ready at all times during the term of the contract (option) to convey the property to defendant, Krech, subject to the terms thereof. (T of E pp 9, 47, 48, and 53).

II. IS APPELLANT ENTITLED TO A 5% COMMISSION ON THE PURPORTED LISTING PRICE OF THE PROPERTY?

To determine the answer to this question, this Court must examine the "Listing Contract." (T of R p 23), and the "Real Estate Sale and Purchase Contract." (T of R pp 6, 7 and 8), together as the Trial Court did.

Item 9 of the Real Estate Sale and Purchase Contract reads, "The seller agrees to pay the aforesaid broker a commission of (refer to Listing Contract) of the purchase price."

The Listing Contract, in the last portion of numerical paragraph two, reads, "I agree to pay you as agent 5% commission on the amount of gross consideration accepted by me."

Appellee received only $5,000.00 under the forfeiture clause of the Real Estate Sale and Purchase Contract, basically this was the full amount that he was entitled to, therefore Appellant could not be entitled to more than 5% of this amount or $250.00.

The Trial Court filed as a part of the record its "Opinion of the Court," (T of R p 66), in which it wrote:

"Because of the provisions contained in paragraphs No. 2 and No. 6, Appellee did not have a contract he could enforce beyond the forfeiture provision in paragraph No. 6, of course, the contract could have provided otherwise, but the provisions, terms or conditions of the contract did not. They were incorporated there in by Mr. Gosser. The contract must be construed more strongly against the party who prepared it."

Bays, Et Al (v) Mahan, Et Al; supra:

CONCLUSION

We respectfully submit, that the Trial Court in its Findings was correct; there was no binding contract between the seller and buyer;

The Trial Court heard this action and wrote an exhaustive opinion as to its Findings: (T of R pp 56 to 67.)

The judgment of the Trial Court should be affirmed in this action.

Respectfully submitted,
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